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Dumping Responsibility: The *Trafigura* Case and the Need for Corporate Accountability in Environmental Law

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'The dumping of nuclear and industrial waste in Africa is a crime against Africa and the African people.'[1]

Abstract

Environmental injustice is rampant in Africa. In August 2006, a cargo ship owned by Trafigura Limited, a multinational company, illegally dumped toxic waste in Côte d'Ivoire. This led to seventeen people dying of toxic gas inhalation. Over 100,000 people were affected and left ill. On 5th September 2023, the African Court on Human and Peoples' Rights in *La LIDHO, LE MIDH, LA FIDH & others v the Republic of Cote d'Ivoir*e held that Côte d'Ivoire was responsible for that environmental disaster. However, the African Court robustly debated the liability of the multinational corporations under the African Charter on Human and Peoples' Rights, with the majority holding that the African Charter applies indirectly to multinational corporations. In contrast, the minority held that there is scope for directly applying the African Charter. This decision is important for two reasons: first, it reaffirms the fourfold obligations of the state regarding environmental law; secondly, the African Court recognised, though it was divided, the liability of multinational corporations. The majority judgment recognised the indirect horizontal application of the African Charter, whereas the minority called for direct horizontal application.

I. Introduction

In August 2006, a cargo vessel called *Probo Koala*, chartered by Trafigura Limited, a multinational company dealing in oil and metals trading,[2] disposed of approximately 600 tons of caustic soda and petroleum residues at the port of Abidjan, the capital of Côte d'Ivoire in West Africa.[3] This waste was then spread to eighteen open-air public waste sites by a subcontractor, a newly created company called Tommy Limited, which Trafigura procured.[4] Tommy Limited was established solely to dispose of *Probo*

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[1] Organisation of African Unity, *Resolution on Dumping of Nuclear and Industrial Wastes in Africa* (1988) reprinted in Michael R Molitor (ed), *International Environmental Law Primary Materials* (Kluwer Law International 1990) 76.

[2] Trafigura, 'About Us' https://www.trafigura.com/who-we-are/#our_story accessed 24 April 2024.

[3] Amnesty International, 'Trafigura: A Toxic Journey' (11 April 2016) https://www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/ accessed 20 April 2024.

[4] Okechukwa Ibeanu, 'Report of the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights,

Koala's hazardous waste.[5] None of the eighteen sites were designated chemical waste treatment facilities. The primary materials contained in the waste was 'slops', a term encompassing cargo and tank-washing residues.[6] These 'slops' contained substantial amounts of hydrogen sulfide, sodium hydroxide and mercaptans.[7] Trafigura had tried to dump its waste before – in five countries, to be exact.[8] Côte d'Ivoire was its sixth attempt, and this time, with the alchemy of corruption, it was successful.[9]

Overnight, the city of Abidjan was smothered by a terrible stench, smelling of rotten eggs.[10] This stench permeated the city of around five million inhabitants. News reports at the time noted that people experienced nosebleeds, nausea, headaches, rashes, and vomiting caused by fumes.[11] Over the next several days, approximately 100,000 people rushed to hospitals and other medical centres, seeking medical attention. Unfortunately, seventeen of those people died from toxic gas inhalation.

On 5th September 2023, the African Court on Human and Peoples' Rights ('African Court'),[12] held that Côte d'Ivoire failed to protect the right to life,[13] the right to receive information,[14] the right to enjoy the best attainable state of physical and mental health,[15] and the right to a satisfactory environment,[16] as enshrined in the African Charter on Human and Peoples' Rights ('African Charter').[17] As a result, the African Court concluded that Côte d'Ivoire violated Article 1 of the African Charter.[18] This decision is important for two reasons: first, it reaffirms the fourfold obligations of the state regarding environmental law; secondly, the African Court recognised, though it was divided, the liability of multinational corporations.[19]

Addendum: mission to Côte d'Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008)' (3 September 2009) UN Doc A/HRC/12/26/Add.2, para 26 https://www.refworld.org/reference/mission/unhrc/2009/en/69836 accessed 24 April 2024.

[5] *La LIDHO, LE MIDH, LA FIDH & Others v Republic of Côte d'Ivoire* ('*Trafigura*') App No 041/2016 (African Court on Human and Peoples' Rights, 5 September 2023) [9] fn 7.

[6] For a broader discussion on 'slopes', see Christoph Gertler, Michail M Yakimov, Mark C Malpass and Peter N Golyshin, 'Oil Tanker Sludges and Slops' in Kenneth N Timmis (ed), *Handbook of Hydrocarbon and Lipid Microbiology* (Springer 2010) 257-265.

[7] Rob White, 'Toxic Cities: Globalising the Problem of Waste' (2009) 35 Social Justice 107, 109.

[8] The countries are Malta, Italy, Gibraltar, the Netherlands, and Nigeria. Disposing of the waste in Amsterdam caused an environmental issue, with residents reporting foul odours and suffering nausea, dizziness, and headaches after the unloading process.

[9] Rebecca Bratspies, 'Corrupt at Its Core: How Law Failed the Victims of Waste Dumping in Côte d'Ivoire' (2018) 43 Columbia Journal of Environmental Law 418, 467-473.

[10] Ibid 418.

[11] Ibeanu (n 4) at para 30; Antonio Cardesa-Salzmann, 'The Trafigura Case' (2012) Environmental Justice Organisations, Liabilities and Trade Factsheet No 45 1-2.

[12] The African Court is a regional court with jurisdiction to hear matters concerning the African Charter, and other relevant human rights instruments. See Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The case was brought by three non-governmental organisations, namely: Ligue Ivoirienne des Droits de l'Homme, Mouvement Ivoirien des Droits Humains and Fédération Internationale pour les Droits Humains.

[13] Article 4 of the African Charter.

[14] Article 9(1) of the African Charter.

[15] Article 16 of the African Charter.

[16] Article 24 of the African Charter.

[17] *Trafigura* (n 5) [265].

[18] Article 1 of the African Charter.

[19] Sfiso Benard Nxumalo, 'Beyond State Responsibility: The Trafigura Case and Corporate Accountability in Africa' (*Oxford Human Rights Hub*, 27 February 2024)

Notably, the African Court was divided on the question of the liability of multinational corporations under the African Charter, especially those in extractive industries. The majority held that while the primary responsibility lay at the proverbial feet of the state, corporations may be indirectly liable under the African Charter. Taking a markedly different approach, the minority judgment, penned by Judge Blaise Tchikaya, argued that multinational corporations may be held directly liable under the African Charter. In his words, 'Trafigura became fully liable the moment it loaded toxic and hazardous waste that was dangerous to human life and the ecosystem onto a vessel'.[20] For him, the horizontal application of human rights to multinational corporations was especially vital in environmental law. As such, it should not merely be used as a theoretical conjuncture. While the case concerned other rights, such as the right to life, this analysis primarily concerns corporate accountability under the African Charter in environmental law matters.

Taking heed of the dissenting judgment's observation, this case analysis briefly argues for a paradigm shift under the African Charter, from understanding human rights as exclusively concerned with constraining states to extending their application to multinational corporations. The rights under the African Charter should be understood as aimed at constraining *power*. This would be considering the increasing power enjoyed by corporations, which tends not just to be economic power but also translates into political and social power. This, it is argued, is the spirit and purport of the dissenting judgment in *Trafigura*.

Ergo, the next few pages will be structured as follows. First, the normative frameworks and applicable laws that regulate environmental law throughout Africa will be canvassed and set out. This includes hard law, soft law, and legal principles emanating from cases decided by the African Court and the African Commission on Human and Peoples' Rights ('African Commission'). Secondly, I will return to the *Trafigura* case and examine the reasoning of both judgments. Finally, I will advocate for a paradigm shift from viewing human rights as solely constraining state actors to understanding them as concerned with constraining power more broadly.

II. Understanding Environmental Rights in the African Human Rights System

Forty-two African countries expressly or implicitly recognise a right to a healthy environment.[21] Africa was the first continent to explicitly recognise the right to a healthy environment in a regional human rights framework. The African Charter under Article 24 explicitly recognises the right to a generally satisfactory environment favourable to peoples' development. The Charter does not further elucidate this provision; thus, much of its content emerges from case law. However, the African

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https://ohrh.law.ox.ac.uk/beyond-state-responsibility-the-trafigura-case-and-corporate-accountability-in-africa/ accessed 26 April 2024.

[20] *La LIDHO, LE MIDH, LA FIDH & Others v Republic of Côte d'Ivoire* ('*Trafigura Dissent*') App No 041/2016 (African Court on Human and Peoples' Rights, 5 September 2023) [34].

[21] Explicit recognition: Algeria, Angola, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Ethiopia, Gabon, Guinea, Kenya, Malawi, Mali, Mauritania, Morocco, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Somalia, South Africa, South Sudan, Sudan, Togo, Tunisia, Uganda and Zimbabwe. Implicit recognition: Ghana, Liberia, Namibia, Niger, Nigeria and United Republic of Tanzania.

Commission on Human and Peoples' Rights ('African Commission') has held that the right to health, as set out in Article 16, encompasses environmental considerations.[22] In another case, the African Commission highlighted the mutually reinforcing relationship between these two rights.[23] *SERAC* acknowledged that the right to a general satisfactory environment is 'closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.'[24] Another right that has been associated with this environmental right is Article 21 of the African Charter. This provision guarantees the right of all peoples to dispose of their wealth and natural resources freely. Notwithstanding a handful of cases, Article 24 of the African Charter has not received considerable judicial attention.[25]

While Article 24 of the African Charter speaks of a right to an environment that is 'general satisfactory' (sic), this right has been interpreted to include a 'healthy',[26] 'clean and safe',[27] or 'safe satisfactory' environment. [28] [29] The *sine quibus non* of this right includes the entitlement to clean water and air, as well as an obligation to prevent pollution.[30] The right also extends to fishing, land, minerals, deforestation, mining, and farming.[31]

Notably, this right applies to 'peoples' rather than individuals. The African Charter does not specifically define 'peoples', as the drafters considered it difficult to agree on a precise definition.[32] Recognising this difficulty, the African Commission remarked that 'peoples' is a highly contested term with legal and political connotations.[33] Thus, its meaning must be context-dependent and nuanced, as no single accepted definition exists.[34] In the scholarly literature, there is a fierce conceptual debate on the meaning

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[22] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* Communication 279/03-296/05 (African Commission on Human and Peoples' Rights, 27 May 2009) [212].
[23] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* ('*SERAC*') Communication 155/96 (African Commission on Human and Peoples' Rights, 27 October 2001) [52]-[53].
[24] Ibid [51].
[25] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019) 547.
[26] *SERAC* (n 23) [52].
[27] Ibid [51].
[28] Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res.153 (25 November 2009).
[29] Unfortunately, there are some cases that raise environmental concerns, but the African Commission does not invoke Article 24 of the African Charter. For instance, see *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* ('*Endorois*') Communication 276/03 (African Commission on Human and Peoples' Rights, 25 May 2009).
[30] Semie M Sama, 'Land Grabbing and the Right to a Healthy Environment: The Pursuit of Sustainability under the African Charter on Human and Peoples' Rights' in Semie M Sama and Jean-Claude N Ashukem (eds.), *Human Rights and the Environment in Africa: A Research Companion* (Taylor & Francis 2023) 239.
[31] Ibid.
[32] Richard Kiwanuka, 'The meaning of the "people" in the African Charter on Human and Peoples' Rights' (1988) 82 American Journal of International Law 80, 82. See also, Obiora Chinedu Okafor, 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' (*UN Human Rights Commission*, December 2013), https://www.un-ilibrary.org/content/books/9789210559720s008-c005 accessed on 31 July 2024.
[33] *Endorois* (n 29) [147].
[34] Ibid.

of 'peoples',[35] which I will not traverse in this analysis. Beyond this difficulty, 'peoples' may refer to nations, groups, and communities, including indigenous peoples. The term emphasises collective rights, sometimes called 'group rights.[36] It can be argued that environmental rights under the African Charter should be understood through a community-based perspective, acknowledging the interconnectedness of individuals across generations. This reflects a profoundly African philosophical value, *ubuntu*, which holds that a human being is human because of other human beings.[37] Recognising that these rights extend to the living, the dead, and the unborn emphasises a commitment to inter-generational equity, preserving cultural heritage, and fostering sustainable development.

Notably, in *SERAC*, the African Commission recognises fourfold obligations that flow from Article 24 of the African Charter. These obligations are imposed on the state and refer to the duty to respect, protect, promote, and fulfil environmental rights.[38] The Commission reasoned that Article 24 was perspicuous in imposing obligations on states to take reasonable steps to secure ecologically sustainable development.[39] Significantly, the Court in *SERAC* held that the duty to protect places an obligation on the state to regulate and monitor the activities of private actors and ensure that they comply with their statutory responsibilities and procedural obligations. This is especially so since private actors commit and perpetrate the most environmental harm.[40]

Another important instrument is the Bamako Convention.[41] In its preamble, the Convention provides that states should be cognisant of the increasing threat of hazardous wastes to the environment and human health. Under Article 4, state parties are required to take appropriate legal, administrative, and other measures to prohibit the importation of hazardous wastes for any reason into Africa from 'non-contracting parties'. The Bamako Convention's definition of hazardous wastes is broader than that of the Basel Convention, which Côte d'Ivoire ratified in 1994. The Basel Convention regulates the transboundary movement of hazardous waste to protect human health and the environment. It prohibits the export of such waste to countries that cannot

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[35] See for instance, Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003) 320; Wolfgang Benedek, *Human Rights in a Multi-Cultural Perspective: The African Charter and the Human Right to Development* (Springer 1983); Evelyn A Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (Martinus Nijhoff 1996) 167; Kiwanuka (n 32) 95-96; and Joseph Oloka-Onyango, 'Human rights and sustainable development in contemporary Africa: a new dawn, or retreating horizons?' (2000) 6 Buffalo Human Rights Law Review 39, 59.

[36] Benjamin Elias Winks, 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 African Human Rights Law Journal 447, 450.

[37] This concept emerges from a Zulu proverb, *umuntu ngumuntu ngabuntu*. See Yvonne Mokgoro, '*Ubuntu* and the law in South Africa' (1998) 4 Buffalo Human Rights Law Review 15, 15-16. IsiZulu is one of the Nguni languages, along with IsiXhosa, SiSwati and Ndebele.

[38] *SERAC* (n 23) [44]-[47].

[39] Ibid.

[40] *Ibid* [53]-[55].

[41] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991) ('Bamako Convention'). This treaty was adopted in response to the feeling by African states that they were not adequately represented in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989). Juliette Voinov Kohler, *Elgar Encyclopaedia of Environmental Law* (Elgar 2017) 367-371.

manage it safely and requires prior informed consent between exporting and importing states. Unlike the Basel Convention, the Bamako Convention also covers waste materials that, due to their radioactivity, fall under any international regulatory frameworks, including specialised international agreements governing radioactive substances.[42] It is worth noting that the Bamako Convention entirely prohibits and bans the import of hazardous waste, whereas the Basel Convention sets rules to control and regulate such imports.

The Algiers Convention (and its revised 2003 Convention) is also significant.[43] The Convention sought to protect Africa's remarkable wildlife and natural resources, including soil, water, flora, and fauna. This was particularly important due to the rapid decline of big game animals from unregulated hunting. It recognised the need for African nations to utilise their natural resources for development, while emphasising that such development should be sustainable and undertaken with a long-term view to avoid depletion.

In its Guidelines on Article 21 and 24 of the African Charter (the Guidelines being soft law), the African Commission noted that Article 24 of the African Charter does not require an ideal, clean, unaffected environment. It merely requires a clean environment for a safe and secure life, ensuring the development of individuals and peoples.[44] The African Commission identified four duties that flow from Article 24.[45] This echoes the *ratio* of the African Commission in *SERAC*, discussed above. While the state is the primary duty-bearer, private actors, such as multinational corporations, also have duties towards rights holders. In particular, the African Commission recognises that if Article 27 of the African Charter places duties on individuals to exercise their rights with 'due regard to the rights of others', there is an even stronger legal and moral impetus to impose duties on corporations.[46] This is predicated on the 'huge extent of power' that corporations exercise.[47] These obligations are both negative (in that corporations should refrain from certain harmful conduct) and positive (in that corporations have an obligation to perform certain conduct to promote the well-being of the communities in which they operate).[48]

Similarly, the UN Guiding Principles on Business and Human Rights state that corporations should respect human rights and act with due diligence to avoid human rights harms.[49] This obligation is independent of the state's obligations.[50] Through these principles, corporate responsibility is owed to society. Notably, the Principles impose a corporate responsibility (not a duty) to respect human rights; however, this

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[42] Kohler (n 37) 368.
[43] African Convention on the Conservation of Nature and Natural Resources (1968) ('Algiers Convention'). This continent-wide agreement was superseded by the African Convention on Conservation of Nature and Natural Resources (2003).
[44] African Commission on Human and Peoples' Rights, 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (30 October 2021) [27].
[45] Ibid [41]-[55].
[46] Ibid [56].
[47] Ibid [57].
[48] Ibid [56]-[65].
[49] Guiding Principle 13.
[50] Ibid.

responsibility does not extend to preventing and fulfilling human rights.[51] Although these Guiding Principles are not legally binding, they have been referred to in various cases, including in domestic courts.[52] Thus, they arguably represent a weak form of corporate accountability,[53] compared to the African Charter, which has legal force.[54]

III. The Reasoning of the African Court

The African Court held that Côte d'Ivoire violated rights contained in the African Charter. As stated above, these included the right to life, the right to an effective remedy, the right to enjoy the best attainable physical and mental health, the right to a generally satisfactory environment, and the right to receive information. In essence, the Court reasoned that Côte d'Ivoire not only failed in its duty to prevent hazardous waste dumping, but also subsequently failed to offer an adequate and effective remedy, and did not provide sufficient information and compensation.

1. It's the State's Responsibility: The Majority Decision

In determining whether the right to a general satisfactory environment was violated, the African Court endorsed the reasoning of the African Commission in *SERAC*, which held that Article 24 places clear obligations on the government to take reasonable steps to prevent 'pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'[55] The Court also cited General Comment No. 14 of the United Nations Committee on Economic, Social and Cultural Rights, which defines the right to a healthy environment as including the duty to prevent a population's exposure to harmful substances and other adverse environmental conditions.[56] According to the majority, Article 2 of the Algiers Convention was also relevant. The Algiers Convention requires state parties to take necessary measures to ensure that the conservation and development of water, soil, flora, and fauna resources are in the people's best interests and are in line with scientific principles. [57]

The Court concluded that Côte d'Ivoire had a clear duty to prevent waste dumping without the necessary safety measures. It further held that, where such dumping

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[51] Nadia Bernaz, 'Conceptualising Corporate Accountability in International Law: Models for Business and Human Rights' Treaty (2021) 22 Human Rights Review 45, 49-50

[52] Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 Texas International Law Journal 33, 43. In terms of domestic courts, the UN Guiding Principles have been referred to in: *Milieudefensie et al v Royal Dutch Shell plc* (2021) (Netherlands); *SUHAKAM "Don Sahong Dam" Inquiry* (2015) (Malaysia); *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others 2015* (5) SA 221 (WCC) (South Africa); *Paranova Läkemedel AB v Jönköping County Procurement Unit* (2018) (Sweden); and *Comunidad Campesina de Asacasi v Ministry of Energy & Mines* (Constitutional Tribunal, 2023) (Peru).

[53] Bernaz (n 32) 49-50.

[54] For a more in-depth discussion on the Guiding Principles, see Brigitte Hamm, 'The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty' (2021) 23 Human Rights Review 103-125; Surya Deva and David Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

[55] *Trafigura* (n 5) [179].

[56] Ibid [180].

[57] Ibid [181].

occured, the state was obligated to ensure the full and effective decontamination of the affected areas. The Court also found that Côte d'Ivoire failed to comply with the Bamako Convention, which, as stated above, bars the importation of hazardous waste.[58] Additionally, the state did not fulfil its duty to ensure that Tommy Limited possessed the requisite skills and equipment to treat the waste.[59] Côte D'Ivoire did not, according to the majority's finding, take timely and sufficient action to decontaminate and clean the affected areas. Thus, the state failed to protect and promote the rights guaranteed under Article 24 of the African Charter.[60]

The majority asserted that even if non-state actors mishandled the waste, this would not absolve Côte d'Ivoire of its responsibility to protect the environment.[61] In discussing the right to life, the majority noted that while the primary duty to respect international law obligations lies with states, there are obligations imposed on corporations, particularly multinational corporations. To this end, the majority relied on the Guiding Principles, which provides that the corporate obligation to respect human rights is separate and independent from the obligations of states.[62] It is on this point that the minority judgement disagrees.

2. *Beyond the State – The Minority's Reasoning*[63]

Judge Tchikaya, in a sole dissent, reasoned that international human rights law punishes the state for transgressions that occur within its territory, but it is for the judges to 'introduce the necessary arbitration' in cases where the transgressions are committed by a different entity that wields excessive power.[64] He further held that the horizontal application of rights extends to environmental law.[65]

The minority is critical of the majority's conclusion that Côte d'Ivoire is liable because no evidence demonstrated that liability should rest solely with the state. In fact, according to Judge Tchikaya, 'Trafigura became fully liable the moment it loaded toxic, hazardous waste that was dangerous to human life and the ecosystem onto a vessel.'[66] He acknowledged, however, that adopting such an approach would require a fundamental change to the orthodox approach to international liability in human rights.[67]

Judge Tchikaya contended that Trafigura, as an entity under international law, committed damage when it dumped hazardous waste in areas without chemical waste treatment facilities.[68] The polluter must pay.[69] The fact that Trafigura had paid large sums of money to Côte d'Ivoire ($198 million), the Netherlands (€ 1 million) and

[58] Ibid [138].
[59] Ibid [139].
[60] Ibid [182]-[186].
[61] Ibid [182].
[62] Ibid [142].
[63] The authoritative text of the judgment is in French. An official English version is provided by the African Court, on which this note is based.
[64] *Trafigura Dissent* (n 20) [54].
[65] Ibid [43].
[66] Ibid [34].
[67] Ibid [33].
[68] Ibid [38]
[69] Ibid.

29,614 claimants (£30 million) in relation to its dumping activities should be taken seriously to avoid accountability being rendered nugatory.[70] Judge Tchikaya called for judicial intervention to develop a new approach to establish the liability of private actors under environmental law.[71] In his view, the UN Human Rights Committee recognised that liability can exist alongside that of states.[72] Thus, a horizontal application is possible. The case for a paradigm shift to constraining power is evident in the environmental law cases in Africa.

If the majority's opinion plants its feet on familiar ground, Judge Blaise Tchikaya's dissent ventures into less charted waters. His is not the cautious voice of incrementalism, but the judicial equivalent of striking a match in a darkened room. In his view, the question is not whether Trafigura had obligations under the African Charter, but whether those obligations were direct and enforceable as a matter of existing law. On balance, his reasoning blends *de lege lata* assertion with *de lege ferenda* ambition. He grounds his approach in principles already embedded in international law, the maxim that 'the polluter must pay',[73] the horizontal effect of human rights, and the evolving recognition in UN instruments that corporate responsibilities exist independently of state action and then presses for their full expression in the African Charter context.

The logic unfolds in three moves. First, he disputes that Côte d'Ivoire's liability was sufficiently established on the evidence; the chain of attribution to the state, he argues, is weak. This refusal to pin the primary wrong on the state clears conceptual space for the second move: the direct imputation of the environmental harm to Trafigura. Here, he borrows from both domestic law (the French Civil Code's fault-based liability) and general international law to treat Trafigura as 'an entity subject to international law' that caused mass harm.[74] In his formulation, liability crystallised 'the moment it loaded toxic and hazardous waste that was dangerous to human life and the ecosystem onto a vessel.'[75]

The third move confronts orthodoxy head-on. Treaties, the textbooks remind us, bind states.[76] But Tchikaya invokes the doctrine of horizontal effect, in the German tradition, *Drittwirkung*,[77] to argue that human rights norms can and should govern relations between private actors where the power disparity and potential for abuse are grave. For him, environmental rights under Article 24 are a natural field for such application: the harm is collective, the victims dispersed, and the corporate actor's power comparable to, or exceeding, that of some states. He draws on the UN Guiding Principles on Business and Human Rights to underscore that corporate responsibility to respect human rights is not contingent on state compliance; it 'exists over and above' it.[78]

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[70] Ibid [37].
[71] Ibid [38].
[72] Ibid [41]-[42].
[73] Ibid [38]
[74] Ibid [36].
[75] Ibid [34].
[76] Hennie Strydom and Kevin Hopkins, 'International Law' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd ed, Juta 2013) Chapter 30.
[77] See Eric Engle, 'Third Party Effect of Fundamental Rights (*Drittwirkung*)' (2009) 5 Hanse Law Review 165-173.
[78] *Trafigura Dissent* (n 20) [41].

This is where he parts company with the majority in a way that matters. Both accept that corporations have responsibilities; both cite the Guiding Principles. But the majority treats these as non-binding, implemented indirectly through the state's duty to protect. Tchikaya, by contrast, treats them as part of a larger normative architecture in which corporations themselves are duty-bearers under the Charter. His position moves the corporate role from the penumbra of 'responsibility' into the bright light of 'liability'. In his hands, the African Charter is not merely a shield against state abuse; it becomes a net that can be cast directly over non-state actors whose conduct wreaks havoc on life, health, and the environment.

IV. Concluding Remarks: A Necessary Paradigm Shift

The minority's argument is compelling. Article 1 of the African Charter has been interpreted as a provision requiring the state to respect, protect, promote, or fulfil the rights contained therein.[79] Much of the jurisprudence on this provision has focused on the state's obligations.[80] In *Noah Kazingachire*, the African Commission held that a state would be liable if it neglected to protect the rights in the African Charter, even if it was not the 'immediate cause of the violation'.[81] This is by virtue of that state acceding to Article 1.

Considering this reasoning, non-state actors have been considered not to have any obligations flowing from Article 1. Non-states include multinational corporations, private persons, local companies, and armed groups.[82] Thus, since these entities are not implicated under Article 1, the African Commission has remarked that the African Charter expressly requires the state to regulate the conduct of non-state actors. In other words, a state may be liable if the state fails to take adequate measures to prevent 'private' human rights violations.[83] This approach generally reflects the idea that human rights are aligned vertically.[84] Rights govern the relationship between individuals and the state, not the relationship between individuals.[85]

The primary justification for human rights and constitutional frameworks broadly is the concentration of power in a 'single institutional nexus', the state.[86] This approach

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[79] *The Nubian Community in Kenya v The Republic of Kenya* Communication 317/06 (African Commission on Human and Peoples' Rights, 28 February 2015) [169]-[170]; *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication 368/09 (African Commission on Human and Peoples' Rights, 5 November 2013) [92].
[80] Murray (n 25) 23-25.
[81] *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* Communication 295/04 (African Commission on Human and Peoples' Rights, 2 May 2012) [141].
[82] African Commission on Human and Peoples' Rights, 'Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (24 October 2011) [7].
[83] *Zimbabwe NGO* (n 61) [147]; *SERAC* (n 23) [52].
[84] John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) American Journal of International Law 1, 1.
[85] Danwood Mzikenge Chirwa, 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 Law, Democracy and Development 22, 22.
[86] Frank Michelman, 'Constitutions and the Public/Private Divide' in Michael Rosenfeld and Andreas Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 305.

in present times is not immune from criticism.[87] Various sources of power outside of the state may violate one's rights. The vertical approach to human rights places the state at the centre of the human rights enquiry. This leaves the rights-bearer as a secondary consideration, primarily because the first question rests on whether the state is involved or has played any part in the facts before an adjudicative body. This also creates a human rights vacuum where corporations can operate without respecting human rights. Instead, the focus should be on the rights-bearer and the existence of a power to frustrate or violate those rights. The subsequent inquiry will be on whether the party accused of violating such a right has the power to do so.

In *Kilwa*, a case concerning the massacre of seventy people in Kilwa, Democratic Republic of Congo ('DRC'), the African Commission recognised the role of the DRC and held it liable for the killings.[88] However, it went further and recognised that Anvil Mining, an Australian-incorporated multinational corporation operating a copper and silver mine in the DRC, was complicit in the massacre by providing logistical support to the soldiers who bombarded and killed civilians. As such, the Commission ordered the DRC to criminally investigate Anvil Mining and state officials for their involvement in the violations. Even though the African Commission did not hold Anvil responsible under the African Charter, it, cognisant of the responsibility of corporations in extractive industries, subsequently issued a letter to Anvil, imploring Anvil to acknowledge its role in that case and contribute to the compensation of victims.[89]

Considering the spirit and call of the African Commission in *Kilwa* that there is an essential and legal imperative for corporations in the extractive industries to conduct their operations with full respect for human rights, the African Charter and the soft law discussed above, including the Guiding Principles, provide a legal basis for this paradigm shift. Human rights must constrain every locus of power within society. Notably, the soft law recognises that corporations are a locus of power as they exercise great power. Therefore, the African Charter should be interpreted as a living instrument adaptable to contemporary challenges. This approach is consistent with international human rights law principles, which advocate for dynamic and purposive interpretation to ensure the adequate protection of human rights. As part of this development, the African Court can expand its interpretation of the obligations under the Charter to include non-state actors, recognising that modern human rights abuses increasingly involve corporate entities.

The facts of this case remind us of the complex nature of waste import and disposal in Africa. The movement of dangerous waste across borders involves various stakeholders with distinct agendas. Initially, there are the waste producers, typically large industries in developed countries, aiming for cost-efficient disposal methods. Some may even establish facilities in less regulated regions to circumvent stricter domestic rules. Conversely, developed countries have enacted rigorous regulations to

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[87] See Gautam Bhatia, 'Horizontal Rights: An Institutional Approach' (DPhil thesis, University of Oxford 2021) https://ora.ox.ac.uk/objects/uuid:c40d9e07-102c-49da-89ca-fofoffaed36c/files/dn296wz48x accessed 25 April 2024.

[88] *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo* Communication 393/10 (African Commission on Human and Peoples' Rights, 18 June 2016).

[89] African Commission on Human and Peoples' Rights, 'Letter to Anvil Mining Company on its role in human rights violations in the DRC' (19 December 2016) https://achpr.au.int/en/news/press-releases/2016-12-19/letter-anvil-mining-company-its-role-human-rights-violations-drc accessed 26 April 2024.

safeguard their environment and populace from hazardous waste. These rules pose challenges for waste management firms, which struggle to find economically viable disposal avenues amidst the stringent regulations.[90]

This dynamic opens doors for developing countries, especially those in Africa, to accept waste disposal. Yet, this opportunity carries significant repercussions. The lack of stringent laws and regulations in Africa has resulted in inadequate management of much of this waste, turning the continent into a dumping ground with dire environmental and public health consequences.[91]

While the majority did not directly extend liability to Trafigura, the significance of the judgment cannot be gainsaid. First, while the majority attributed the human rights violations to the Ivorian state, Judge Tchikaya's dissenting judgment advocated extending accountability to multinational corporations involved in these violations. This underscores a crucial discourse surrounding corporate responsibility in Africa. Secondly, the dissent underscores the missed opportunity to directly attribute responsibility to the corporation, particularly considering the foreseeable repercussions of their actions. Thirdly, both judgments emphasise the need for heightened accountability standards within the framework of the African Charter, signalling a push for more stringent corporate responsibility measures within the African human rights system. Fourthly, the dissent highlights the relevance of soft law advancements such as the African Commission's State Reporting Guidelines.

The significance of this dissent cannot be overlooked. It is not simply a difference in emphasis; it is a difference in legal architecture. The majority's model remains vertical: the Charter's obligations flow to states, who in turn are expected to regulate corporations. The dissent's model is both vertical and horizontal: the Charter's obligations can fall directly upon corporations themselves, enforced without the mediation of state responsibility. This is more than a doctrinal variation; it is an invitation to reconceive the African Charter as a living instrument capable of constraining all loci of power, public or private, that have the capacity to inflict grave harm on people and the environment.

If embraced, Tchikaya's approach would mark a turning point in African human rights jurisprudence. It would close the accountability gap that allows powerful corporate actors to evade the full force of human rights law simply because they are not states. It would also anchor environmental protection more firmly in the African Charter's constitutive structure by recognising that the greatest threats to a satisfactory environment may come not from neglectful governments alone, but from private actors wielding resources and influence on a scale once reserved for states. In this sense, the dissent is not a footnote to the case; it is its most forward-looking chapter.

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[90] Dire Tladi, 'The quest to ban hazardous waste import into Africa: first Bamako and now Basel' (2000) 33 Comparative and International Law Journal of Southern Africa 210, 210.
[91] Ibid, 210-211.